SECOND DIVISION
September 30, 2011

No. 1-10-2095
2011 IL App. (1st) 102095-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	09 CR 09732
	)	
TATIANA VALENTINE,	)	Honorable
	)	Rosemary Grant-Higgins,
Defendants-Appellants.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Quinn and Justice Cunningham concurred in the judgment of the court.

ORDER

Held: State failed to prove defendant guilty beyond a reasonable doubt of constructive possession of a controlled substance where defendant was not present at the location where the drugs were found and the State's evidence was insufficient to establish that defendant resided at that address.

¶1 Chicago police officers found several baggies of crack cocaine during the execution of a search warrant on a home. Defendant Tatiana Valentine did not own or rent the home and was not present when the drugs were found, but she was later found guilty by a jury of possession of a controlled substance. The State's evidence tying defendant to the drugs consisted of two pieces of year-old mail, a mutilated Illinois state identification card, and defendant's attempt to flee from police when she was arrested nearly six months after the search. Defendant argues on appeal that (1) the evidence was not sufficient to prove her guilty beyond a reasonable doubt, (2)

the court coerced a verdict by ordering the jury to continue deliberating after it became apparent that there was a holdout juror, and (3) that she should not have been assessed certain fines and fees. We reverse.

¶2 BACKGROUND

¶3 Armed with a search warrant, Chicago police officers raided a house at 5409 S. Carpenter on the afternoon of November 17, 2008, which belonged to defendant's grandmother. Defendant's grandmother was not home at the time, and the only people present in the home were defendant's sister (who did not live there) and several children. Defendant's grandmother testified at trial that defendant had previously lived in the home on the first floor but had moved out several months before. Defendant's grandmother testified that at the time of the search the only people who lived in the house were the grandmother and her daughters, one of whom lived on the second floor and the other in the basement.

¶4 The officers focused their search on the basement, which had a front area with a bar, a bedroom area that contained a mattress and some women's clothing, and a small television area. In the television area, the officers observed women's clothing stored in garbage cans, duffle bags, and laundry baskets.

¶5 The officers also found several baggies of crack cocaine in the television area. Eleven baggies were recovered from a cardboard box on a shelf, and another 13 baggies were found inside of a boot on the floor nearby. The officers also found two battery-operated scales and several boxes of plastic sandwich bags in the area. Importantly for this case, the officers found three items that apparently belonged to defendant. On a shelf below the one that held the cardboard box in which the drugs were found, the officers found an Illinois state identification card, a credit card statement, and a court notice for a traffic ticket.

¶6 As the officer who found these items testified at trial, the state identification card was severely damaged when he found it. The card was cracked and the portion that normally contained the picture was broken off. In the address block, the street name "S. Carpenter" was visible, but the house number was missing except for a "9". The name of the card owner was also partially missing, reading only "T-I-A-N-A". The signature was intact and purported to be that of defendant, but it was never authenticated.

¶7 The other two documents were both addressed to defendant by name, but while the credit card statement was addressed to her at 5409 S. Carpenter, the traffic notice was addressed to her at a different location. Both documents were over a year old when they were found by the officers.

¶8 Defendant was not present when the officers executed the search warrant, and over the next five and a half months they returned to 5409 S. Carpenter between five and ten times in order to find her. Defendant was not present at the house on any of those occasions. On April 30, 2009, the same officers who conducted the search saw defendant on the sidewalk in front of the house. The officers, who were not in uniform but were wearing body armor with their stars displayed, exited their unmarked police car and approached defendant. Defendant opened the gate to the yard and attempted to run into the house. After a brief struggle, defendant was taken into custody and was charged with possession of the drugs that were found in the basement during the search.

¶9 At trial, the State argued that defendant was guilty of possession of a controlled substance under a theory of constructive possession. The State argued that defendant lived in the basement area and that the drugs therefore belonged to her, relying on the three documents found near the drugs, the women's clothing in the area, and defendant's attempt to flee from police

when she was arrested. The defense argued that defendant did not live in the basement at the time of the search, relying largely on defendant's grandmother's testimony and the age and condition of the documents when they were found.

¶ 10 About five hours into jury deliberations, a juror sent a note to the judge, which read:

¶ 11 "Could I be excused from Jury Duty. I cannot come to the same conclusion as the rest of my Jurors? And it will not happen. I cannot sign the verdict with good conscious [*sic*]."

¶ 12 Based on this note, defendant asked the trial court to declare a mistrial due to jury deadlock, noting that the jury had already deliberated longer than it took the parties to present the entire case. The State urged that a *Prim* instruction (*People v. Prim*, 53 Ill. 2d 62, 74 (1972)) was unnecessary. The trial court elected to send the jury home for the night and to give the *Prim* instruction the following day.

¶ 13 The next day, the trial court gave the *Prim* instruction over the objections of both parties and ordered the jury to resume deliberations. About five minutes later, the jury sent out another note, which read:

¶ 14 "Can we have a transcript and testimony of two officer's and [defendant's grandmother]? One juror would like to talk to the judge. Is that possible?"

¶ 15 Over defendant's objection, the trial court told the jury that it would attempt to procure the transcripts. The trial court also decided, with the consent of the parties, to send back a note asking the juror to clarify the purpose of asking to speak with the judge. Several notes were exchanged over the next half hour between the courtroom and the jury room, which read as follows:

¶16 "[JUROR] 10:10 AM: I feel there is not enough evidence to prosecute and cannot sign a guilty verdict. – I have anxiety that is making this difficult to be in this room. I feel like I am being detained against my will and I am asking to be dismissed. Furthermore, I have developed a bias against the judicial system that has come out during deliberation which should be grounds for dismissal.

¶17 [COURT] 10:15 AM: The transcripts can be prepared by early afternoon. Would the transcripts you have requested aid in the deliberative process?

¶18 [JUROR] 10:20 AM: It may help but I cannot be detained that long, and I don't know if it will help my bias.

¶19 [COURT] 10:30 AM: Transcripts are being prepared and will be given to you when completed."

¶20 While these notes were being exchanged, the trial court discussed the situation with the parties. Defendant argued that no verdict was possible at this point and urged the trial court to declare a mistrial, while the State argued that the court should wait until the transcripts were delivered before making a ruling. The last communication from the jury came at 11:45 a.m., when the jury sent a note asking to see the search warrant. This request was denied and the jury was order to continue deliberating.

¶21 The record is not clear when the jury finally returned a verdict, but it eventually found defendant guilty of possession of a controlled substance. Defendant asked the court to poll the jury, during which the following exchange occurred:

¶22 "THE CLERK: Jeffrey Barry, was this then and is this now your verdict?

¶23 THE COURT: Who is Jeffrey Barry? Sir.

¶24 JUROR BARRY: I will plead the fifth.

¶25 THE COURT: You have to answer that question, sir. Sir, there is no fifth amendment right as a juror. Can you answer that question?

¶26 JUROR BARRY: Okay. Yes.

¶27 THE COURT: I am not forcing you to answer that question. I am just asking you – repeat the question please.

¶28 THE CLERK: Jeffrey Barry, was this then and is this now your verdict?

¶29 THE COURT: Do you understand the question?

¶30 JUROR BARRY: Yes.

¶31 THE COURT: Can you answer it?

¶32 JUROR BARRY: Yes.

¶33 THE COURT: What is your response?

¶34 JUROR BARRY: Yes."

¶35 After the poll was completed and the jury retired to the jury room, defendant again moved for a mistrial based on the notes, Juror Barry's demeanor in court, and his inability to immediately affirm the verdict. After a brief recess in order to consider the motion, the trial court denied the motion.

¶36 Defendant was later sentenced to two years probation and, among other fines and fees not challenged on appeal, she was assessed $20 for the Violent Crime Victims Assistance Fund (725 ILCS 240/10(c) (West 2010)), a $5 Court System Fee (55 ILCS 5/5-1101(c) (West 2010)), a $25 Court Supervision Fee (625 ILCS 5/16-104(c) (West 2010)), and a $20 Serious Traffic Violation fine (625 ILCS 5/16-104(d) (West 2010)). This appeal followed.

¶37 ANALYSIS

¶38 The primary issue that defendant raises on appeal is whether the State presented sufficient evidence to prove her guilty beyond a reasonable doubt of possession of a controlled substance. When reviewing the sufficiency of the evidence,

> ¶39 "our function is not to retry the defendant. [Citation.] Rather, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citations.] This means that we must allow all reasonable inferences from the record in favor of the prosecution. [Citation.] As a reviewing court, [w]e will not reverse a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt. [Citation.]" (Quotation marks omitted.) (Citations omitted.) *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011).

¶40 In order to prove possession of a controlled substance, the State must establish that defendant (1) had knowledge of the presence of the drugs and (2) had exclusive possession and control of the drugs. See *People v. Schmalz*, 194 Ill. 2d 75, 81 (2000). Possession may be actual or constructive. See *People v. Givens*, 237 Ill. 2d 311, 335 (2010). "Actual possession is the exercise by the defendant of present personal dominion over the illicit material and exists when a person exercises immediate and exclusive dominion or control over the illicit material, but does not require present personal touching of the illicit material." *Id.* In contrast, "[c]onstructive possession exists without actual personal present dominion over a controlled substance, but with an intent and capability to maintain control and dominion. [Citation.] Where narcotics are found on premises under the defendant's control, it may be inferred that he had the requisite knowledge and possession, absent other facts and circumstances which might leave a reasonable

doubt as to guilt in the minds of the jury." *People v. Freiberg*, 147 Ill. 2d 326, 361 (1992). Although proof of control over a location is helpful because it creates an inference of knowledge and possession, it is not a prerequisite for conviction if possession can be proven through other evidence. See *People v. Adams*, 161 Ill. 2d 333, 345 (1994).

¶41 In this case, the State proceeded on a theory of constructive possession. Because the State did not present any direct evidence that defendant was aware of the presence of the drugs and intended to and was capable of maintaining dominion and control over them, the State's case relied solely on an inference of knowledge and control based on defendant's alleged control over the basement area. This indirect method of proof originated in *People v. Nettles*, 23 Ill. 2d 306, 308 (1962), in which the supreme court explained:

> ¶42 "[W]here narcotics are found on premises under defendant's control, it may be inferred that the defendant had both knowledge and control of the narcotics. This inference is based largely upon the nature of the commodity and the manner in which its illegal traffic is conducted. By law the use of narcotics, except for specified medicinal purposes, is rigidly condemned. Because of this illegitimate nature of narcotics, they are sold for exorbitant sums on the black market and are therefore of great value to the person possessing them. Furthermore, since their mere possession may subject such person to severe criminal consequences, the narcotics traffic is conducted with the utmost secrecy and care. Human experience teaches that narcotics are rarely, if ever, found unaccountably in a person's living quarters."

¶43 So in order to benefit from this inference in this case, the State was required to prove that the basement was defendant's living quarters or residence.

¶44 The State did not introduce direct evidence that showed that defendant owned or rented the basement area. See, *e.g.*, *People v. Mack*, 12 Ill. 2d 151 (1957); *People v. Green*, 54 Ill. App. 3d 252 (1977). Nor did the State present testimony from any witnesses that defendant lived in the basement area at the time of the search, or that she even lived in the house at that time. *Cf.*, *e.g.*, *People v. McCarter*, 339 Ill. App. 3d 876, 877 (2003) (police officer testified that he had previously encountered defendant at apartment and defendant had given that address as his residence). Instead, the State relied on five pieces of circumstantial evidence: (1) the women's clothes found in the area, (2) the mutilated state identification card, (3) the credit card statement, (4) the traffic notice, and (5) defendant's attempt to flee from arresting officers.

¶45 Although we are highly mindful of the deference accorded to a jury's determinations on issues of fact such as knowledge and possession (*Mack*, 12 Ill. 2d at 160), we are compelled to conclude that none of this evidence is sufficient to prove that defendant resided in the basement area at the time of the search. We will discuss each piece of evidence in turn.

¶46 To begin with, the fact that the officers saw women's clothing in the basement area where the drugs were found has no bearing on the question of residence because the State failed to connect these clothes to defendant. There is no evidence in the record that these clothes belonged to defendant, and there is not even circumstantial evidence from which the jury might infer that they belonged to her. While this fact might possibly be entitled to some weight had the State proved that there were no female occupants in the house, the record unequivocally demonstrates that the only adult occupants of the house were female. Because the State failed to prove that the clothes belonged to defendant, the fact that women's clothing was found near the drugs does nothing to prove that defendant controlled the basement area.

¶47 Next, there is the identification card. Although the name and picture of the card's owner were missing or incomplete, considering this piece of evidence in the light most favorable to the State we will assume that the card was in fact defendant's, given that the signature purported to be hers (though this was never authenticated). Still, there are at least two problems with using the state identification card to prove residence. First, testimony at trial made clear that the card was so damaged that the street address was incomplete. The card only displayed a "9" and the street "S. Carpenter," so it is at best unclear whether the residence address listed on the card was in fact 5409 S. Carpenter. Still, construing this evidence in the light most favorable to the State, it is at least a conceivable inference.

¶48 Yet even allowing this inference cannot remedy the second and more serious deficiency: the State presented no evidence that this particular identification card was currently valid and therefore accurately reflected defendant's current residence address. This is fatal to the State's ability to rely on the identification card as sufficient proof of defendant's guilt. Aside from the mutilation of the card, which possibly rendered the card invalid by itself (see 15 ILCS 335/4(a) (West 2010) (requiring identification cards to include, among other things, a picture of the cardholder)), Illinois law allows cardholders to obtain replacement cards when a card is lost or destroyed. 15 ILCS 335/7 (West 2010). There is no evidence in the record that this card was the most recent one issued to defendant by the Secretary of State. This is critical, because Illinois law also requires cardholders to obtain a new card within 10 days of changing their residence address (15 ILCS 335/6(b) (West 2010)), and there is no evidence in the record that this residence address is the one currently on file with the Secretary of State. The State could have easily obtained copies of the Secretary of State's records to prove this point (see 15 ILCS 335/11 (West 2010)), but it failed to do so.

¶49 Perhaps the most crucial point is that the State failed to prove that the card was current. Illinois state identification cards expire every five years (15 ILCS 335/8 (West 2010)), and there is no evidence in the record of the date that the card was issued, much less the date that it expired. Without the issuance and expiration dates, the argument that this card is evidence that defendant resided at 5409 S. Carpenter at the time the drugs were found is wholly speculative. Even leaving aside all of the other problems with the card, we cannot accept this card as sufficient proof of defendant's residence without at least some evidence that the card is valid and can be used as legal identification. See 15 ILCS 335/4 (West 2010).

¶50 There are similar problems with using the credit card statement and the traffic notice as evidence of residence. The traffic notice is perhaps the most problematic, given that it was not even addressed to defendant at the address where the drugs were found. Leaving aside the fact that the notice was over a year and a half old when it was found, and even if we were to assume without deciding that the notice could qualify as sufficient evidence of residency, the notice does nothing to help the State's case. In fact, the notice would harm the State's case because it would be evidence that defendant did *not* live at the Carpenter house. It consequently has no bearing on the issue of residence (at least in the State's favor), and is therefore insufficient as proof of defendant's guilt.

¶51 Of the three documents, this leaves only the credit card statement. The statement's age is problematic, given that it was over a year old at the time of the search. The most factually similar case that we are aware of is *People v. Ray*, 232 Ill. App. 3d 459, 461 (1992), in which the defendant's conviction for possession of cocaine rested solely on defendant's presence in the apartment where the drugs were found and a cable bill in his name. The appellate court reversed, finding that the cable bill was insufficient evidence of constructive possession. See *id.*

at 463. But see *People v. Eghan*, 344 Ill. App. 3d 301, 308 (2003) (noting that the evidence in *Ray* may have been sufficient following the supreme court's decision in *Adams*, 161 Ill. 2d at 344-45, because the defendant was present in the apartment when the cocaine was found). The evidence in this case is even less sufficient than in *Ray*, given that defendant was not even in the basement when the drugs were found, unlike the defendant in *Ray*.

¶52 Moreover, the mail at issue in *Ray* was a cable utility bill, whereas in this case it is a credit card statement. Unlike a credit card statement, which is merely personal mail that can be sent anywhere and has no bearing on an individual's control over the premises to which the bill is sent, a cable bill indicates that the addressee has at least some control over the premises where services are received. See generally 220 ILCS 5/22-501 (West 2010) (detailing the rights of cable customers and obligations of cable service providers). Finally, the credit card statement was over a year old, nearly twice as old as the six-month old utility bill that was found to be insufficient in *Ray*.

¶53 The result of all of this is that none of the documents that the State offered as evidence are sufficient proof for the crucial issue of constructive possession. This leaves as evidence against defendant only her attempt to flee from the police when she was arrested.[1] "The fact of flight, when considered in connection with all other evidence in a case, is a circumstance which may be considered by the jury as tending to prove guilt. [Citation.] The inference of guilt which may be drawn from flight depends upon the knowledge of the suspect that the offense has been committed and that he is or may be suspected." *People v. Lewis*, 165 Ill. 2d 305, 349 (1995).

[1] Defendant moved *in limine* to exclude this evidence, but the motion was denied. Defendant did not object when the evidence was presented and did not include the denial of the motion *in limine* in her posttrial motion (*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), and she does not ask us to review the denial under the plain error doctrine (*People v. Hillier*, 237 Ill. 2d 539, 545-46 (2010)). We therefore only consider whether the flight evidence is sufficient to support her conviction, not whether this evidence was properly admitted.

"While evidence that a defendant was aware that he was a suspect is essential to prove flight, actual knowledge of his possible arrest is not necessary to render such evidence admissible where there is evidence from which such fact may be inferred." *Id.* at 350.

¶54 The State presented no evidence during the trial that defendant was aware that she was the suspected owner of the drugs. Defendant was not present during the search, and there was no evidence that she was in contact with the police during the five and a half months between the search and her arrest. Although the State argues in its brief that defendant must have known she was a suspect because she was named in the warrant (which was left at the house) and because some of her family members were present during the search, this is merely speculation and is not supported by the record. The State presented no evidence at trial that defendant was in contact with her family between the search and her arrest or was otherwise made aware of the warrant.

¶55 The State did not introduce any direct evidence that defendant knew she was a suspect, so it relies on circumstantial evidence in order to justify using defendant's flight in order to prove possession. The States argument is that (1) defendant resided in the basement, so she must have known that she was a suspect; (2) she knew that she was a suspect, which was why she fled; (3) she fled, so she must have owned the drugs; and (4) the drugs were in the basement, so she must have resided there. This argument is circular. The State's theory of the case depends on the inference of knowledge and control over premises that comes with residence, yet its argument is essentially that defendant is guilty because she fled and that she fled because she was guilty. The State must present some evidence that defendant knew that she was a suspect in order to infer guilt from flight, and the State failed to do so here. The evidence of defendant's flight is therefore insufficient to prove the element of possession.

¶56 To sum up: the problem with this case is that, because defendant was not present when the drugs were found, the State's theory depended on proving the element of possession *solely* through the inference of knowledge and intent that comes from control over a location. In order to benefit from this inference, it was crucial that the State prove that defendant resided in the basement area of 5409 S. Carpenter when the drugs were found. None of the evidence that the State presented to the jury was sufficient to prove that fact.[2] On the facts of this case, without proof of residence, there can be no inference of knowledge and control. Without proof of knowledge and control, there can be no constructive possession. And without proof of constructive possession, the State cannot prove guilt. Because the State failed to prove the essential element of possession, it failed to prove defendant guilty of possession of a controlled substance beyond a reasonable doubt.

¶57 CONCLUSION

¶58 For the reasons stated above, the evidence was insufficient to prove defendant guilty of possession of a controlled substance. We therefore reverse the judgment of conviction. Because we reverse due to insufficiency of the evidence, we do not reach defendant's other contentions on appeal.

¶59 Reversed.

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[2] We are aware that in its brief the State contends that defendant has consistently claimed this address as her residence, for example during the bond hearing and in presentence investigation reports. The State fails to recognize, however, that this information, even if true, is irrelevant because it was not presented to the jury. It consequently has no bearing on this appeal.